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No. 86-1098

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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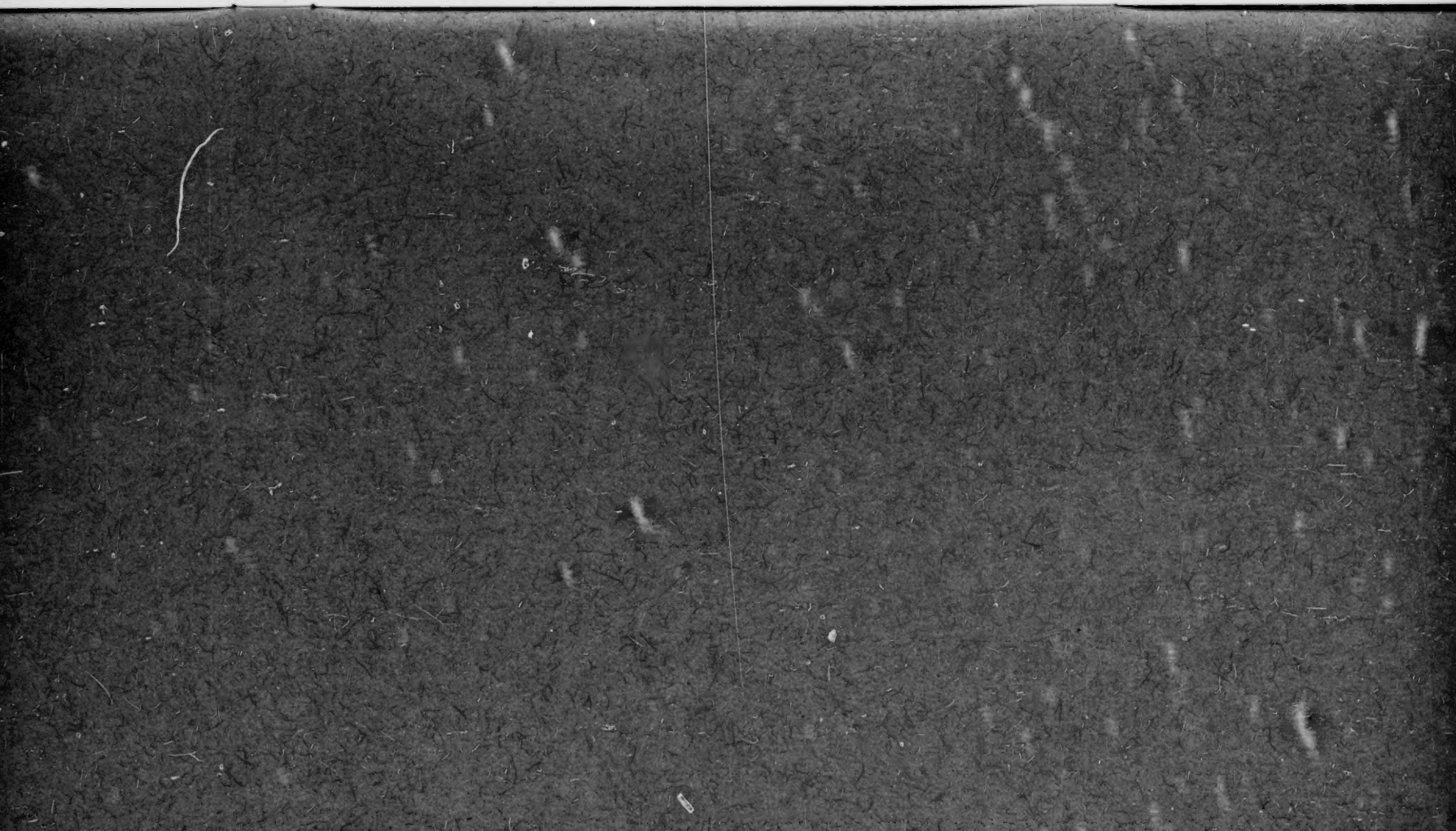

QUESTION PRESENTED

1. Whether a jury verdict denying criminal forfeiture of seized assets under 21 U.S.C. (Supp. II) 853 precludes the government from later seeking civil forfeiture of those assets under 21 U.S.C. (& Supp. II) 881.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-10a) is reported at 802 F.2d 646. The opinion of the district court (Pet. App. 1a-4a) is reported at 630 F. Supp. 1035.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1986. The petition for a writ of certiorari was filed on January 2, 1987. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 8, 1985, a grand jury returned an indictment against petitioner charging him with attempted possession of cocaine with intent to distribute, in violation of 21 U.S.C. 846. The indictment included an application for criminal forfeiture, pursuant to 21 U.S.C. (Supp. II) 853, of two

sums of currency, $4,000 and $28,500, that petitioner had tendered to undercover Drug Enforcement Agency (DEA) agents as payment for the cocaine (Pet. 1). Following a jury trial, petitioner was convicted of the drug charge. The jury found that the $4,000 sum was subject to forfeiture but that the $28,500 sum was not (Pet. 2; Pet. App. 1a, 7a).[1]

The United States then instituted civil forfeiture proceedings against the $28,500, pursuant to 21 U.S.C. (& Supp. II) 881. The district court enjoined the government from going forward with that action (Pet. App. 1a-4a), holding that once the government elected to proceed against the $28,500 by way of criminal forfeiture, it was foreclosed from later bringing a civil forfeiture proceeding. The court of appeals reversed (*id.* at 5a-10a). The court concluded that principles of res judicata and collateral estoppel would not bar the civil forfeiture proceeding (*id.* at 7a) and that Congress did not intend that the government's unsuccessful attempt to obtain criminal forfeiture of money used in drug transactions would bar a subsequent civil forfeiture action.

ARGUMENT

Petitioner concedes (Pet. 4) that the federal forfeiture statutes do not expressly preclude successive criminal and civil forfeiture proceedings. He nonetheless contends that Congress could not have intended that result, arguing that "[a]llowing the Government to pursue both remedies would be unfair to the citizen and defeat the objectives of Congress" (*id.* at 7). The court of appeals correctly rejected that argument. That court's decision does not conflict with the decisions of this Court or of any other court of appeals. Further review is therefore unwarranted.

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[1]Subsequently, petitioner was granted a new trial on the ground that the jury had been given an erroneous entrapment instruction. On retrial, petitioner was acquitted of the drug charge.

1. It is settled that Congress may impose both criminal and civil sanctions for the same conduct, and that "acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based * * *." *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938). See *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) (per curiam). See also *United States* v. *Kordel*, 397 U.S. 1, 11-13 (1970). There is nothing intrinsically "unfair" about that result.[2]

2. Similarly, there is no basis for concluding that Congress wished to preclude successive criminal and civil forfeiture actions. Neither the criminal nor the civil statute provides that the government's decision to proceed under one statute bars a subsequent action under the other. It is therefore appropriate to infer that the Congress did not intend to create mutually exclusive forfeiture remedies.

Petitioner contends (Pet. 6-7) that the legislative history of Section 853 indicates that resort to one statute bars later resort to the other. However, as the court of appeals recognized (Pet. App. 8a-10a), the materials petitioner cites do not support that inference. The Senate report describes the

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[2]For example, in *United States* v. *One Assortment of 89 Firearms*, *supra*, the defendant was charged with, and acquitted of, dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1). The government then instituted an *in rem* action for forfeiture of the firearms involved, pursuant to 18 U.S.C. 924(d). This Court reversed the court of appeals' ruling that the forfeiture action was barred by principles of double jeopardy and collateral estoppel (465 U.S. at 361-366). The same principles are applicable here. As the court of appeals recognized, "[petitioner's] prior acquittal under the criminal forfeiture statute merely determined that the government's proof failed to overcome all reasonable doubt that the sum of $28,500 should be forfeited" (Pet. App. 7a). And the acquittal could not, of course, raise a double jeopardy bar to a civil forfeiture action.

criminal forfeiture provision as an "alternative" to the pre-existing civil proceedings (S. Rep. 98-225, 98th Cong., 1st Sess. 193 (1983)), and it states that the amendments would "allow Federal prosecutors, in appropriate circumstances, to pursue criminal, rather than civil, forfeitures in drug cases" (*id.* at 196), thus providing prosecutors "the option of pursuing a criminal forfeiture in which the forfeiture action can be consolidated with the prosecution of the offense giving rise to forfeiture" (*id.* at 197). These passages, however, do not support petitioner's contention. They merely recognize that the government may pursue either criminal or civil forfeiture; they do not indicate that the choice of the criminal option precludes later resort to the civil remedy.

The legislative history of Section 853, when read as a whole, indicates that Congress intended to expand, not limit, the choices available to prosecutors. The Senate report demonstrates that Congress wished to increase the use of forfeiture "as a law enforcement tool in combatting two of the most serious crimes facing the country: racketeering and drug trafficking" (S. Rep. 98-225, *supra*, at 191). The report cites the inefficiencies in the civil forfeiture mechanism that had resulted in an "unmanageable" backlog of civil forfeiture cases (*id.* at 196). For example, the then-existing law required the government to file a separate forefeiture action even though a criminal conviction dispositively resolved the same facts that would be at issue in the civil forfeiture action (*ibid.*). And in cases where the defendant's property was located in more than one judicial district, separate civil forfeiture suits had to be filed in each such district (*id.* at 196-197). Congress added the criminal forfeiture provision to provide a "more efficient method of obtaining the forfeiture of assets of drug defendants" (*id.* at 197). Given Congress's plainly expressed goal of encouraging forfeiture actions, there is no reason to believe that

Congress intended that invocation of the new criminal provisions would prevent later use of the preexisting civil remedies.[3]

Additionally, as the court of appeals correctly noted (Pet. App. 9a), the statutory interpretation urged by petitioner would seriously limit the usefulness of the criminal forfeiture statute. If prosecutors were required to choose between criminal and civil forfeiture, they would in many cases choose to proceed by way of civil forfeiture, despite its inefficiencies, because civil forfeiture imposes a less demanding standard of proof than criminal forfeiture. The criminal forfeiture remedy would thus be underutilized, in obvious frustration of congressional intent. Finally, the criminal forfeiture statute's express provision that the statute be "liberally construed to effectuate its remedial purposes" (21 U.S.C. (Supp. II) 853(o)) further supports the court of appeals' conclusion that the criminal and civil forfeiture provisions are not mutually exclusive.

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[3]Indeed, Congress commonly imposes both criminal and civil penalties for the same transaction, and the reasonable assumption is that Congress wished to continue that practice here. Cf. *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404, 412 (1969) ("the legislative grant of a new right does not ordinarily cut off or preclude other nonstatutory rights in the absence of clear language to that effect"); *Air Transport Association of America* v. *Professional Air Traffic Controllers Organization*, 667 F.2d 316, 321 (2d Cir. 1981) (citations omitted) ("we can presume that Congress is aware of settled judicial construction of existing law * * * and that it intends to retain those remedies that it has left in place").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

DEBORAH WATSON
Attorney

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